(4)

Supreme Court, U.S.
FILED
JUN 5 - 2003
OFFICE OF THE CLERK

No. 02-1393

In the

Supreme Court of the United States

GORDON B. SAUCERMAN; JOE BENJAMIN; SHARRON BENJAMIN; CLEO FREEMAN,

Petitioner,

v.

GALE NORTON, Secretary of the Interior; KEVIN GOVER, Assistant Secretary for Indian Affairs; ELUID MARTINEZ, Commissioner of Reclamation; WAYNE NORDWALL, Phoenix Area Director for Bureau of Indian Affairs; JANET WONG, Staff Solicitor; WAYNE SUMATZKUKU, Bureau of Indian Affairs Realty Specialist; WILLIAM TITCHYWY, ALLEN ANSPACH; CHEMEHUEVI TRIBAL COUNCIL; ROBERT MOELLER; EDWARD SMITH; DAVID CHAVEZ;; CHEMEHUEVI TRIBAL COUNCIL; DAVID CHAVEZ; EDWARD SMITH; ROBERT MOELLER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

Marina Tramontozzi
Counsel of Record
R. Alex Morgan
c/o Law Office of R. Alex Morgan
Attorney at Law
4518 N. 35th Place
Phoenix, Arizona 85018
(602) 912-5640

13 pp

TABLE OF CONTENTS

TABLES OF AUTHORITIES ii

STATEMENT 1

ARGUMENT 3

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

ARIZONA V. CALIFORNIA, 373 U.S. 546 (1963) ..... PASSIM

ARIZONA V. CALIFORNIA, 530 U.S. 392, 413-416 (2000) 4, 5

CALIFORNIA V. UNITED STATES, 490 U.S. 920 (1989) 3, 8

INYO COUNTY V. PAIUTE-SHOSHONE INDIANS OF THE BISHOP COMMUNITY, 538 U.S. ____ (MAY 19, 2003) 8

IOWA MUTUAL INS. CO. V. LAPLANTE, 480 U.S. 9 (1987) 7

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA V. UNITED STATES, 830 F. 2D 139 (9TH CIR. 1987) ..... PASSIM

MONTANA V. UNITED STATES, 450 U.S. 544 (1981) 6, 7

NATIONAL FARMERS UNION INS. CO V. CROW TRIBE, 471 U.S. 845 (1985) 7

PANAMA REFINING CO. V. RYAN, 293 U.S. 388 5

SCHECTER POULTRY CORP. V. UNITED STATES, 295 U.S. 495 5

SOUTH DAKOTA V. BOURLAND, 508 U.S. 679 (1993) 7

STATE OF KANSAS V. UNITED STATES, 249 F.3D 1213 (10TH CIR. 2001) 8

STRATE V. A-1 CONTRACTORS, 520 U.S. 438 (1997) 7

UNITED STATES V. JORGENSEN, NO. 93-55296, 1997 WL 355849, *1 (JUNE 27, 1997) 3

UNITED STATES V. NAVAJO NATION, 537 U.S. _____, 123 S CT. 1079 (2003) 8

UNITED STATES V. WHITE MOUNTAIN APACHE TRIBE, 537 U.S. _____, 123 S CT. 1126 (2003) 8

WILDMAN V. UNITED STATES, 827 F.2D 1306 (9TH CIR. 1987) 5, 9

YOUNGSTOWN SHEET & TUBE CO. V. SAWYER, 343 U.S. 579, 587-589 5

Regulations

42 U.S.C. §1983 ..... 8, 9

42 U.S.C. §1985 9

28 U.S.C. §2409a(a) 4, 7

STATEMENT

Petitioners brought this suit in the Federal District Court for Arizona after receiving eviction notices from the Chemehuevi Tribal Court. The following additional facts are in reply to the statements made in the Briefs in Opposition.

1. As the United States admits, the Secretary of Interior on behalf of the Chemehuevi Indian Tribe has actively reasserted tribal sovereignty over the entire area taken by the Parker Dam Act of 1940, 54 Stat. 744, based on this Court's ruling in *Arizona v. California*, 373 U.S. 546 (1963). U.S. Br.Opp. 2. This reassertion of tribal sovereignty began in 1974 and initially culminated in the Settlement Agreement of 1976 which was based on a Secretarial Restoration Order of August 15, 1974 that expressly protected the valid existing rights of the petitioner cabin owners.

2. After 1990, the Chemehuevi Tribe asserted that the equitable title of the shoreline was restored to them under a November 1, 1974 Secretarial Order. According to the representations the Chemehuevi Tribe has made regarding the contents of the November 1, 1974 Secretarial Order, no rights were recognized as existing in the cabin owners. This is the position taken in this case by the Chemehuevi Tribe and Secretary of Interior. Tribal Br.Opp. 3, U.S.Br.Opp. 3. Counsel for petitioners has never seen a complete draft of a November 1, 1974 Secretarial Order.

The Chemehuevi Tribe took this same position in their application for a trust patent still pending before the Bureau of Land Management (BLM). The BLM officially requested a copy of the November 1, 1974 Secretarial Order from the Office of the Secretary of the

Interior. The Office responded in writing that they do not have any Secretarial Order of that date for the Chemehuevi Indian Tribe. The BLM has issued a draft trust patent which includes the valid existing rights of the petitioners to their cabins. The Chemehuevi Tribe has not accepted the draft trust patent.

As was pointed out to the Ninth Circuit, the United States never cites the November 1, 1974 order using its own citation form of either an order number or federal register page and date. Every time the United States cites the November 1, 1974 Order it is by citing the Tribe citing the Order. U.S. Br. Opp. 3.

3. The Chemehuevi Tribal Court papers petitioners were served denied them the right to challenge the jurisdiction of the tribal court over them based on the purported Secretarial Restoration Order of November 1, 1974. The papers stated that the non-Indians could not be represented by counsel in tribal court. Further, the Chemehuevi Tribal Court Clerk refused to provide the required court forms to any of the non-Indian defendants. The non-Indian defendants were informed that any answers or motions not filed on the appropriate forms would not be accepted. Supp.Tr. Complaint 11-12.

All of this was presented and discussed before the Federal District Court at which time Tribal Counsel stated that the non-Indians would be allowed to present their arguments in tribal court represented by counsel. The non-Indians were given the opportunity to challenge the jurisdiction of the tribal court over them in proceedings before the Tribal Court Judge. However, no copy of a November 1, 1974 Secretarial Order was ever submitted to the tribal court. The November 1, 1974 Order was accepted as existing from affidavits of Tribal Officials testifying to its contents. Before the Ninth Circuit ruled on the appeal, tribal court remedies had been completely exhausted and the Chemehuevi Tribal

Court Order denying the Motion for Reconsideration of the Default Judgments was filed with the Clerk of the Ninth Circuit by Motion to Take Judicial Notice.

4. After 1990, the Chemehuevi Tribe did offer leases to the petitioner cabin owners which were based on the purported November 1, 1974 Secretarial Order requiring the non-Indians to consent to full tribal jurisdiction and relinquish all rights to their cabins. No lease according to the terms of the Settlement Agreement or Secretarial Order of August 15, 1974 was ever offered by the Chemehuevi Tribe to the non-Indian petitioners. Petitioners would gladly have paid rent to the Chemehuevi Tribe if leases that protected their rights under the terms of the Settlement Agreement had been offered.

5. Neither the Chemehuevi Tribe or United States deny petitioners's statement that the cabins are located on the designated flood and seep zone right of way of the reclamation project. Nor does the United States deny that the Ninth Circuit ruled in *United States v. Jorgensen*, No. 93-55296, 1997 WL 355849, *1 (June 27, 1997) (116 F. 3d 1487(Table)), that the shoreline was federal land.

ARGUMENT

The United States and Chemehuevi Indian Tribe in their Response Briefs in Opposition to the Petition for Certiorari argue that the rationale of *Metropolitan Water District of Southern California v. United States*, 830 F. 2d 139 (9th Cir. 1987), *aff'd sub. nom. California v. United States*, 490 U.S. 920 (1989) should be upheld by this Court to divest these non-Indians of any constitutional right to challenge the jurisdiction of the Chemehuevi Tribal Court over them in the courts of the United States. Both spend many pages attempting to

support the Secretary's position of reasserting tribal sovereignty over the shoreline. The Ninth Circuit Opinion does not cite to either purported Secretarial Order but holds exclusively on the Solicitor's Opinion of August 15, 1974 as creating a "colorable claim" sufficient in the Secretary to divest the subject matter jurisdiction of the federal courts under the Indian exception to the Quiet Title Act, 28 U.S.C. §2409a(a). App. 3a-4a.

1. The Secretary of Interior's mere assertion of the sovereign prerogative of the Chemehuevi Indian Tribe over these non-Indians is enough under the Ninth Circuit's *Metropolitan Water District* rationale to divest the federal courts of jurisdiction to protect the non-Indians civil rights in a federal court against the Secretary and the Chemehuevi Tribe. App. 4a-5a. The Ninth Circuit's *Metropolitan Water District* rationale is based on the discretionary authority of the Secretary of Interior as interpreted in *Arizona v. California*, 373 U.S. 546, 597-8 (1963) to enforce the Indian Tribes' sovereignty using the full sovereign powers of the United States contained in the Commerce Clause, Art. I, Sec. 8, Cl.1 and Property Clause, Art.IV, Sec.3, Cl.2 of the Constitution as trustee for the tribe under any colorable claim a solicitor can make.

Accordingly, the United States asserts under *Arizona v. California*, 530 U.S. 392, 413-416 (2000), that the Settlement Agreement of 1976 has *res judicata* effect against these petitioners. The United States does not specify which Secretarial Order of 1974 was the basis of the 1976 Settlement Agreement. U.S. Br. Opp. 7-8. The Brief in Opposition of the United States only cites the purported Secretarial Order of November 1, 1974, and then generically cites a 1974 Secretarial Order thereafter. U.S. Br. Opp. 3. The United States never cites the August 15, 1974 Secretarial Order which was the order consented to by petitioners in the Settlement Agreement and accepted by the federal court. Pet. 4, Tr.

Br. Opp. 20-21. According to *Arizona v. California*, 530 U.S. 392, 411-413 (2000) the Settlement Agreement is not entitled to *res judicata* effect when the United States is substituting the purported November 1, 1974 Secretarial Order for the August 15, 1974 Secretarial Order because that would make the November 1, 1974 Order a final boundary determination of the Chemehuevi Indian reservation not subject to judicial review contrary to this Court's earlier ruling in 1983. Despite the subsequent rulings in *Arizona v. California*, the United States in this case is still asserting the absolute discretionary authority of the Secretary to reallocate the shoreline as against all individual private rights under the 1963 ruling as cited above.

The Ninth Circuit's rationale in *Metropolitan Water District* and *Wildman v. United States*, 827 F.2d 1306 (9th Cir. 1987) represents the complete breakdown of the ability to enforce the laws of Congress and of judicial review predicted by the three dissenting Justices in 1963 in *Arizona v. California*. As summarized in the partial dissent of Justice Harlan, Justice Douglas and Justice Stewart:

"The delegation of such unrestrained authority to an executive official raises, to say the least, the gravest constitutional doubts. *See Schecter Poultry Corp. v. United States*, 295 U.S. 495; *Panama Refining Co. v. Ryan*, 293 U.S. 388; *cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-589. The principle that authority granted by the legislature must be limited by adequate standards serves two primary functions vital to preserving the separation of powers required by the Constitution. First, it insures that the fundamental policy decisions in our society will be made not by an appointed official but by the body immediately responsible to the people. Second, it prevents judicial review from becoming merely an exercise at large by

providing the courts with some measure against which to judge the official action that has been taken.

The absence of standards under the Court's construction is an instructive illustration of these points. The unrestrained power to determine the burden of shortages is the power to make a political decision of the highest order. Indeed, the political pressures that will doubtless be brought to bear on the Secretary as a result of this decision are disturbing to contemplate. Furthermore, whatever the Secretary decides to do, this Court will surely be unable effectively to review his actions, since it will not know what guides were intended by Congress to govern those actions." *Arizona v. California*, 373 U.S. 546, 626 (1963).

The dissenting Justices failed to foresee that the "unrestrained power to determine the burden of shortages" was granting the Secretary a separate trust responsibility to reallocate any and all resources the solicitor's office by its own opinion deemed to be under the Secretary's discretionary authority. Even though the shoreline lands are not held in trust status under any law of the United States, both the Chemehuevi Tribe and United States claim throughout their Briefs in Opposition that the shoreline lands are held in trust for the Chemehuevi Indian Tribe. The only trust is the one created by the Lindgren Opinion of August 15, 1974 as the Ninth Circuit has held. App. 3a-4a. The Lindgren Solicitor's Opinion reinterprets the Parker Dam Act as a continuing discretionary grant of authority to the Secretary instead of as a diminishment act as Congress intended. Tr. Br. Opp. 2-3.

2. This Court in *Montana v. United States*, 450 U.S. 544 (1981) applied judicial review to the additional land claim brought by the Secretary of the Interior on behalf of Crow tribal sovereignty to protect the rights of non-Indians and the jurisdiction of the State of Montana. *Montana v. United States* with its test for determining

BEST AVAILABLE COPY

tribal jurisdiction over non-Indians is founded on the equity jurisdiction of this Court.

The Petition for Certiorari is the law argument of how the *Montana* test should apply to this case. The Petition cites *South Dakota v. Bourland*, 508 U.S. 679 (1993), as being on point for this case and asserts that the shoreline of Lake Havasu is a flood and seep zone right of way. Petitioners did not extend the application of *Bourland* into the equity determination made in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), that tribal lands which are a right of way are not to be treated as "Indian lands" under the test of tribal jurisdiction contained in *Montana*. Petitioners sought to avoid a direct equity jurisdiction confrontation between the land status element of *Montana* and the Secretary's absolute authority to designate the land status for one of the five Tribes of *Arizona v. California*. Pet. 11.

The United States in its Response states "petitioners brought this suit against federal officials to challenge whether title to the shoreline area is held by the United States in trust for the Tribe." U.S. Br. Opp. 8. Their definition of these lands being "trust or restricted Indian lands" for purposes of the Indian exception to the Quiet Title Act, 28 U.S.C. 2409a(a) is completely based on the authority of the Secretary to reallocate the shoreline as asserted in the Lindgren Solicitor's Opinion as discussed above.

This Court has reasserted its equity jurisdiction in numerous cases using the *Montana* analysis. Pet.10-12. This Court has also had numerous cases where it has subjugated its equity jurisdiction to the discretionary authority of the Secretary using the *Arizona v. California* analysis. *National Farmers Union Ins. Co v. Crow Tribe*, 471 U.S. 845 (1985), *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). U.S. Br. Opp. 8. *Metropolitan Water Dist. v. United States*, 830 F.2d 139 (9th Cir. 1987), aff'd by equally divided court *sub nom.*

California v. United States, 490 U.S. 920 (1989). U.S. Br. Opp 9. This Court has preserved what effectively are contradictory case lines of federal Indian common law.

Petitioners argue that the Tenth Circuit in *State of Kansas v. United States*, 249 F.3d 1213 (10th Cir. 2001), in preventing the United States from *presupposing* that the land is *de jure* "Indian lands" solved the dispute between the application of the *Montana* test and the Secretary's asserted discretionary authority to designate trust land status for Indian Tribes. Pet. 6-7. Petitioners do not believe that this case requires this Court to reason any further to protect the constitutional rights of these petitioners.

3. In March of this year, this Court began defining the "Indian trust" as a matter of federal common law using its equity jurisdiction. *United States v. Navajo Nation*, 537 U.S. _____, 123 S Ct. 1079 (2003); *United States v. White Mountain Apache Tribe*, 537 U.S. _____, 123 S Ct. 1126 (2003). How these decisions affect the Secretary's discretionary trust authority to assert an additional land claim against previously acknowledged valid existing private rights was not addressed.

This Court in *Inyo County v. Paiute-Shoshone Indians of the Bishop Community*, 538 U.S. ____ (May 19, 2003) has finally confronted the issue of federal courts being used to pursue tribal sovereignty to divest state jurisdiction and the rights and law attached to state jurisdiction. By limiting an Indian tribes' right to sue using 42 U.S.C. § 1983 to break state sovereign immunity in a federal court, this Court recognizes the federalism problem created by tribal sovereignty being extended in the federal courts. More importantly, the Court recognized the problem created by Indian tribes having the right to sue without themselves being subject to suit. This is the equity problem facing these petitioners.

These petitioners alleged reverse racial discrimination against officials of the United States and Chemehuevi tribal officials using 42 U.S.C. §1983 and 42 U.S.C. §1985 to challenge the complete deprivation of their due process and equal protection rights in the federal courts. Supp. Tr. Complaint 22-25. Do they have any right to prevent the Secretary (federal government) from encroaching on their private rights?

The United States and Chemehuevi Tribe argue that these non-Indians have no rights capable of enforcement in federal court under *Arizona v. California*, and its progeny *Wildman* and *Metropolitan Water District* and that this should remain the federal common law of Indian affairs. Petitioners are before this Court to request equal justice under law.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: June 3, 2003

Respectfully submitted,
Marina Tramontozzi
Counsel of Record
R. Alex Morgan
c/o Law Office of R. Alex Morgan
Attorney at Law
4518 N. 35th Place
Phoenix, Arizona 85018
Telephone: (602) 912-5640